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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

Michelle M. Etlin, pro se
3009 Military Rd. NW
Washington, D.C. 20015

March 14, 1989

70 pp

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The Petitioner, Michelle M. Etlin, pro se, respectfully prays that a writ of certiorari issue to the review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia entered in this proceeding on December 14, 1988.

QUESTIONS PRESENTED

1. Can a state satisfy the jurisdictional requirement of "significant connections" and "substantial evidence" as those terms are used in the Uniform Child Custody Jurisdiction Act, if the child

has not lived in that state for more than six years? Can 28 U.S.C. 1738A confer subject-matter jurisdiction on the courts of a state which lacks a statutory basis for such jurisdiction in its own law?

2. Can a state refuse to review a conviction for criminal contempt because of its insistence on a procedural rule which serves no legitimate state interest and is applied in a discriminatory manner? Can a Court use contempt powers to create a new class of laws, infractions against which are punished without resort to Constitutional protection for the accused?

PARTIES TO THE PROCEEDING

Appellant: Michelle Etlin, pro se
3009 Military Road NW
Washington DC 20015
(hereinafter called "Mother")

Appellee: Vladimir Etlin
7403 Lisle Avenue
Falls Church, VA 2043
(hereinafter called "Father")

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21.1(d) - There are no official or unofficial reports of the opinions delivered in the courts below.

JURISDICTION

This Court may take jurisdiction under 28 U.S.C. 1257(3).

The Fairfax County Circuit Court entered a final order on March 25, 1987. The Intermediary Court of Appeals of Virginia affirmed on April 24, 1988, and denied application for rehearing on June 24, 1988. The Supreme Court of Virginia denied the petition for review on December 14, 1988. This Court has jurisdiction because: (i) The Supreme Court of Virginia denied review on December 14, 1988; and (iv) this Court has jurisdiction under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1738A (the "PKPA")

provides, in pertinent part:

"(c) A child custody determination made by a court of a State is consistent with the provisions of this Section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child ...;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and ... at least one contestant, have a significant connection with such state... and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; ... or ***

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section. ***

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

VA CODE Section 20-126 provides, in pertinent part:

§20-126. Grounds for Jurisdiction.--A. A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

1. This State (i) is the home state of the child ...; or

2. It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and ... at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

==========

VA CODE Section 20-135 provides, in pertinent part:

§20-135. Res Judicata effect of custody decree.--A custody decree rendered by a court of this State which had jurisdiction under §20-126 ...is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this chapter.

Article III, Section [3] of the U.S. Constitution provides:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed:..."

==========

Article IV, Section 2.[1] of the U.S. Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

==========

The Eighth Amendment to the U.S. Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

==========

The Fourteenth Amendment to the U.S. Constitution, Section 1 provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

==========

VA Code Section 19.2-318 provides, in pertinent part:

> "19.2-318 Appeal on Writ of Error to Judgment for Contempt.- ... A writ of error shall lie from the Court of Appeals to a judgment for criminal contempt of Court. This section shall also be construed to authorize an appeal from or writ of error to a judgment of a circuit court rendered on appeal from a judgment of a district court for civil or criminal contempt."

STATEMENT OF THE CASE

This Court has seen Etlin v. Etlin four times in the past upon petitions from the father.

Vladimir and Michelle Etlin married in New York in November, 1976 and had a child, Daniel Etlin, on January 20, 1978 in Virginia. They separated in 1980.

Mother and Father agreed to have custody of Daniel decided by a child psychiatrist pursuant to an order of the Juvenile Court dated March 25, 1980, but Father refused to abide by the arbitration decision and sued for custody. Dur-

ing the pendency of proceedings in the Juvenile and Circuit Court, Mother and Daniel moved to Maryland on November 1, 1980. The Fairfax County Circuit Court, per Judge Lewis Hall Griffith, awarded permanent custody of Daniel to Mother by final order entered on February 26, 1981. [Appendix 20-25].

Father sued Judge Griffith in the federal district court in April, 1981 claiming discrimination, and promptly moved the judge to recuse based on the lawsuit. [Appendix 26-27]. That lawsuit was dismissed by the district court and appealed to the Fourth Circuit, which dismissed. He appealed to this Court, which denied certiorari.

Judge Griffith recused because of the lawsuit, but the custody order was incorporated in the final decree on February 12, 1982. Father appealed it to the Virginia Supreme Court, which

refused to review it; he appealed it to this Court, which denied certiorari.

Father then returned to the Circuit Court filing a "motion to set aside court order" for "fraud on the court." [Appendix 27-29]. The parties came before the Court, per Judge F. Bruce Bach, on June 1, 1982 on the mother's motion for enforcement and the father's motion to relitigate custody. Finding no fraud, the court nevertheless set aside Judge Griffith's order and re-tried custody de novo, making his own decision on June 2, 1982 but not signing or entering a final order. [Appendix 29-30].

On September 4, 1982, Mother and Daniel moved away from Maryland leaving no forwarding address. No process was outstanding against Mother at that time, and no injunction or ne excheat order prevented her free movement. When Father realized Mother had moved, he made a

"motion to change custody" which did not comply with the UCCJA's requirements, and served on Mother's prior attorney a rule to show cause why Mother should not be held in contempt. At an ex parte hearing on October 15, 1982, the Court held the Mother in contempt and awarded sole custody to the Father. [Appendix 30-32].

Father requested that the Commonwealth Attorney draw a felony warrant for Mother's arrest, but he declined on the basis that she had not committed a felony in Virginia. Father brought a mandamus proceeding to force the prosecutor to draw a warrant, but he lost, appealed it to the Virginia Supreme Court, which did not grant review; he appealed the mandamus to the this Court but certiorari was denied.

Meanwhile, Mother had been forced to assign her judgments for unpaid child support to the last attorney she had in

Virginia. This lawyer brought garnishment proceedings to collect his fees. Father moved to set aside garnishments, and when denied he appealed. The Supreme Court of Virginia refused review. He appealed to this Court, which denied certiorari.

In 1985, 2-1/2 years after the act complained of, Judge Bach issued a bench warrant for Mother's arrest for criminal contempt, setting $10,000 bond. [Appendix 32-34].

Father had Daniel's picture shown on the Phil Donahue Show as a missing child and as a result located Mother and Daniel in Portland, Oregon in 1986. He sought to have the 1982 ex parte order enforced there. Mother's lawyer pointed out that it was made without statutory notice and was therefore unenforceable. While proceedings were pending, Father physically kidnapped Daniel, taking him to Virginia.

The Virginia court immediately assumed jurisdiction and did the following: (1) it assigned the Department of Social Services to investigate Daniel's welfare but then terminated their investigation and refused to honor their request to appoint a guardian ad litem; (2) it placed Daniel in his father's custody without an examination of parental fitness; (3) it jailed Mother and revoked her bond before trying her for contempt [Appendix 34]; and (4) it held a mixed contempt/custody trial after which it made a punitive custody award to Father and sentenced Mother to 12 months in jail for criminal contempt. [Appendix 11].

Mother's counsel argued that the Virginia Court should not exercise jurisdiction in a hearing before trial on February 20, 1987, but the Judge refused to consider the motion and announced his intention to assume jurisdiction, in a

colloquoy in which the considerations of the UCCJA were not referenced:

COUNSEL: ...I have to file a motion asking you to--under section 20-130 of the Code of Virginia--to defer jurisdiction back to Oregon. Are you ruling on that?

COURT: I'm denying that.
COUNSEL: You deny that motion?
COURT: I don't think Oregon has any jurisdiction over this. ... There have been literally 10, 20, 30 hearings in this court, and there's no way that Oregon
COUNSEL: (Interposing) Your Honor, probably more.
COURT: Yes, probably more. This is the court that's going to hear it. I know these people. I'm going to decide it.

(Transcript February 20, 1987, p. 14)

* * * *

COUNSEL: I would reiterate to you that the child has not lived in this state since 1980, since October 31, 1980; when Judge Griffith awarded custody, he'd been gone from the state about 3 months ... and that when you heard custody in June of '82, he'd been gone however long and so forth and so on. And I would reiterate that the moving party in all of these litigations has been Mr. Etlin who has kept the wheels churning. And I'll stand on my brief for the rest of my argument, including the observations about Sections 20-132, 20-148 [sic], 20-130 and

20-125 [sic], all sections of the Uniform Child Custody Jurisdiction Act adopted in the state.

* * *

COURT: Well, I think the Fairfax County, Virginia Circuit Court is the appropriate jurisdiction to hear it, and I don't think it's even a close question. I think it's the only jurisdiction that has any business at all hearing it. * * * and as far as I know, there's nothing in [the UCCJA] that even remotely indicates that Oregon, under these circumstances, should have custody, or should have jurisdiction over that case.

Transcript, March 12, 1987, pp. 121-124.

COURT: ... Let me say this, too. I also feel, ... I also believe in my heart and soul, that this ... needs to be decided, and I frankly don't think that the Oregon judge, who was very peripherally involved in this thing, or any other judge, is in nearly the position I am to decide this case for the best interest of this child.

Transcript, March 12, 1987, p. 125.

Mother appealed from that order on three grounds: (1) her contempt conviction was improper because the statute of limitations for contempt passed, all acts

complained of had taken place outside the Commonwealth, and because she was held in criminal contempt of an order which contained no injunction or specific command; (2) the court did not, under Virginia law, have jurisdiction to decree as to the custody of Daniel there was no evidence in Virginia upon which to decide custody; and (3) the trial court made a punitive custody award contrary to the best interests of the child and the law of Virginia.

The Court of Appeals refused to consider the contempt conviction because appeal was not brought by writ of error. It affirmed the trial court, opining that the Commonwealth had jurisdiction pursuant to 20-126(b) ("significant connections") [Appendix 15].

Mother applied to the Court of Appeals for reconsideration on three theories: (1) caselaw in Virginia provides

that review by appeal rather than writ of error is, at worst, "inadvertence" and cannot deprive a petitioner of review of criminal contempt conviction; [Appendix 35]; (2) the merging of a custody and contempt trial is a prima facie showing that the custody decree rendered was punitive; and (3) since Virginia had derogated the PKPA by proceeding without compliance with the Act, it could not presume to "continuing jurisdiction" under the PKPA. [Appendix 38-41]

> "Had the trial court ever given consideration to the requirements of the UCCJA [starting in 1982], including Section 20-126(A)(2), and Section 20-135, none of the latter events of this case, including the mother's desperate escape, would have occurred. It is simply unjust to resort to the UCCJA to confirm and justify the actions of a judge whose casual disregard of the Act was the original element that threw the case out of control."

Mother's Petition for Rehearing to the Court of Appeals, April 17, 1988, pp. 16-17.

The Court of Appeals denied rehear-

ing and refused to consolidate Mother's appeal with appeal of the order Judge Bach finally signed in 1988 nunc pro tunc 1982. Mother petitioned the Supreme Court of Virginia for review. Among other assertions, she brought up the fact that the application of the procedural bar to her right to review of criminal contempt conviction had been applied in the Commonwealth in a discriminatory manner, because other criminal contempt defendants' convictions were reviewed by means of appeal. [Appendix 38] She gave oral argument pro se before a writ panel on December 12, 1988; on December 14, 1988 her petition for review was denied. [Appendix 19]

Meanwhile, the custody decision Judge Bach made on June 2, 1982, of which he held Mother in contempt on October 15, 1982, for which he jailed Mother on February 18, 1987; and which he signed on

March 4, 1988; is presently on appeal before the Court of Appeals of Virginia.

Mother also moved the trial court to vacate its ex parte order dated October 26, 1982 because she was never served with notice of the hearing. The trial court refused to hear Mother's motion when it was served and filed, so Mother brought a petition before the Court of Appeals of Virginia to mandate the trial court to vacate that order. The court has demurred and that petition also remains pending.

FEDERAL QUESTIONS PRESENTED BELOW

The question of whether Virginia had subject matter jurisdiction under the significant connections test was first addressed to the trial court in a pre-trial memorandum of law [Appendix 36-37], then briefed to the Court of Appeals and the Supreme Court of Virginia. [Appendix 37-41].

The question of abuse of the contempt powers of a court of the Commonwealth was first raised in the trial court upon oral argument [Appendix 41] and then briefed to the Appellate Court [Appendix 15, 35] and Supreme Court of Virginia [Appendix 38].

REASONS TO GRANT THE PETITION

I. IN DEROGATION OF THE UNIFORM ACT AND THE FEDERAL ACT, VIRGINIA HAS EXERCISED JURISDICTION WITHOUT A STATUTORY BASIS FOR DOING SO.

A. Background of Statutory Scheme Conferring Jurisdiction.

Jurisdiction can only be acquired pursuant to statute; it cannot be presumed or assumed under the common law. Two statutes describe the prerequisites for jurisdiction to hear child custody disputes (continuing or original) in Virginia, as in all other states: the Uniform Child Custody Jurisdiction Act, or the UCCJA (VA Code 20-125 et seq.) and

the Parental Kidnapping Preventing Act, or the PKPA (28 U.S.C. 1738A). (The UCCJA is sometimes referred to herein as the Uniform Act and the PKPA is sometimes referred to as the Federal Act.)

The National Conference of Commissioners on Uniform State Laws and the American Bar Association promulgated the UCCJA in 1968 to bring order to chaos. In spite of this, 12 years later,

> "a number of states refused to enact the UCCJA while others enacted it with modifications. In the absence of uniform national standards for allocating and enforcing custody determinations, noncustodial parents still had reason to snatch their children and petition the courts of any of a number of haven states for sole custody." Thompson v. Thompson, 108 S.Ct. 513, 517 (1988)

In addition to "haven states," there were loopholes. One was the use of the "significant connections/substantial evidence" test (the "SCSE Test") to allow a court to take jurisdiction over custody of a child who had lived else-

where for a long time. Under the provisions of the UCCJA, the two tests (home state or SCSE) were simply alternative, and neither was given preference. The Commissioners and other commentators generally agreed that the SCSE Test should not be used to excess by courts eager to justify jurisdiction. See Ratner, "Procedural Due Process and Jurisdiction to Adjudicate," 75 Nw.U.L.Rev. 363, 392 (1980). But this Court never granted certiorari on the subject.

On December 28, 1980, the PKPA, 28 U.S.C. 1738A, was signed into law. It was meant to end the confusion and induce compliance with the UCCJA. According to this Court, the PKPA amounted to "Federal adoption of key provisions of the UCCJA for all states," Thompson, supra, at 517. The PKPA closed a loophole: it set out in identical language the jurisdictional prerequisites of the

UCCJA, with one difference: it prescribed the home state test for jurisdiction as preferred, and allowed the use of the SCSE Test only as an alternative if there was no home state.

In two other divisions, however, it did not end confusion but perhaps created it. This Court has dealt with the first great misinterpretation that arose from the Federal Act: in its recent decision in Thompson v. Thompson, 798 F.2d 1547 (9th Cir), 108 S.Ct. 513, supra, it affirmed the Ninth Circuit's opinion that the PKPA was not meant to give rise to a private federal cause of action.

What was the PKPA designed to do? It was designed to cause the States to comply with the UCCJA and to vest full faith and credit in those custody orders which did comply with it. The Federal Act, rather than giving rise to federal litigations, was meant to regulate state

court litigations and cause the several States to judiciously comply with their own uniform laws. Again, relying upon this Court's analysis, "the PKPA is a mandate directed to state courts...." Thompson, supra, at 518.

The way the PKPA sought to induce compliance with the UCCJA was twofold: (1) it accorded full faith and credit to custody decrees, but only to those custody decrees which were made in compliance with the PKPA--i.e., only with those custody decrees which followed the dictates of the UCCJA, while elevating home state over significant connections as a basis for jurisdiction; and (2) it set up continuing jurisdiction in a state which had already made a decree (the "Decree State"), again only if that state maintained jurisdiction under its law. As of 1986, all of the 50 states had adopted the UCCJA, the PKPA allows

Decree State modification jurisdiction only if the state maintains jurisdiction under the UCCJA.

B. "Jurisdiction Forever"

As if to complement the misunderstanding about the PKPA opening the doors of federal courthouses to custody trials, another common idea developed which was basically an oversimplification of the Federal Act. It was commonly believed that the Decree State retained the right to make all modification decrees as long as one parent still lived there (the "Jurisdiction Forever Rule").

This would remove from the Decree State the necessity to comply with the UCCJA with respect to modification decrees, an effect which is plainly adverse to the intentions of the PKPA. (It could also encourage punitive custody awards and relitigations contrary to the intent of both Acts.)

The Jurisdiction Forever Rule ignored this logical inconsistency, assuming that conflict between the UCCJA and PKPA was not incongruous and pointing out that when the two acts were in conflict, the PKPA would govern because of federal preemption.

This interpretation, however, does not fit a careful and faithful reading of the law which was actually written. It assumes that the legislators not only meant what they didn't say, but meant something a lot simpler and easier to write than the law they passed. (It rests on the notion that the legislators went out of their way to write something more complicated than what they really meant!) It represents a pragmatic application of the law which is actually contrary to its provisions. In pertinent part, the law reads:

> "(c) A child custody determination made by a court of a State is con-

sistent with the provisions of this Section only if--

(1) such court has jurisdiction under the law of such State; and ***

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the re-quirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant."

Subsection (d) does not say that the Decree State's jurisdiction continues so long as one parent remains in that state. In addition, the requirement of Subsection (c)(1) must continue to be met. Subsection (c)(1) requires the court to have jurisdiction under the law of such state. In the case of every single state now, that is the UCCJA. In Virginia in 1987, that was the UCCJA as adopted by Virginia, that is, 20-125 et seq.

This Court has already recognized that the PKPA confers continuing jurisdiction subject to conditions; in Thompson, supra, the Court says:

> "The sole exception to this [continuing jurisdiction of Decree State] occurs where the first State either has lost jurisdiction or has declined to exercise continuing jurisdiction." Id. at 515.

So the formula set forth by the PKPA is a circular test which incorporates and reiterates the UCCJA's jurisdictional requirements. There is no conflict; the Federal Act encourages and depends upon compliance with the Uniform Act.

In 1987, Daniel was nine years old. He had moved away from Virginia with his custodial parent on November 1, 1981 at the age of less than three years old, never having attended school in Virginia. His doctors, teachers, activities and friends, acquaintances, religious activities, and home were elsewhere. Virginia lacked jurisdiction to hear a modification custody petition.

C. "Significant Connections"

In fact, the trial court did not pretend there was substantial evidence

in Virginia in 1987; the Judge openly stated that his reason for exercising jurisdiction was that there had been plentiful litigation in the Commonwealth. [Supra, p. 7] (Taking into account that one of the main purposes of the UCCJA is to reduce custody litigation, Elder v. Park, App. 1986, 717 P.2d 1132, 104 N.Mex. 163, this would seem to disqualify, not qualify, Virginia to hear the case.)

WHAT ARE SIGNIFICANT CONNECTIONS?

"Significant connections" can be defined in any number of ways. However, it is obvious that "significant connections" does not mean simply and solely that the court made a decree in the past. Although many states have described the SCSE Test, and although Virginia itself applied it in Middleton v. Middleton, 1984, 314 S.E.2d 362, 227 Va. 82, it remains an area prone to abuse and its de-

finition lacks sufficient particularity for uniform application by the several states. Again, the states decide these issues in different ways on different days. Some examples follow.

The fact that Florida had made the original decree and a subsequent modification did not constitute "sufficient connections," where the children had lived with their custodial parent in New York for three years, and only the non-custodial parent lived in Florida. Matteson v. Matteson, Fla. App. 2 Dist.1980, 379 So.2d 677. But cf. Meier v. Davignon, 1987, 734 P2d 807, 105 NM 567.

Visitation with a non-custodial parent by a child who lived in a sister state did not establish jurisdiction. Bills v. Murdock, 1982, 654 P.2d 406, 232 Kan. 237. But cf. In re Marriage of Panich, Mo. App. 1984, 672 SW2d 718.

Jurisdiction could not be asserted

where, prior to filing of the petition for modification, New Mexico was not the children's home state, and the only connection of the children to the state was their father. Trask v. Trask, App. 1986, 727 P.2d 88, 104 NM 780. But cf. William L. v. Michele P., 1979, 416 NYS2d 477, 99 Misc.2d 346.

Visitation with the non-custodial parent was not enough connection to establish jurisdiction. Gomez v. Gomez, 1982, 446 NYS2d 127, 86 A.D.2d 594, aff'd. 452 NYS2d 13, 56 NY2d 746, 437 NE2d 272, stay denied 453 NYS2d 684, 56 NY2d 1028, 439 NE2d 399. But cf. SJ v. LT, Alaska 1986, 727 P2d 789.

Although the father had a significant connection with New York, the child had no connection other than a brief residence prior to commencement of the action. Sullivan v. Sullivan, 1982, 451 NYS2d 851, 87 AD2d 42, aff'd. 458 NYS2d

516, 58 NY2d 642, 444 NE2d 980. But cf. Houtchens v. Houtchens, R.I. 1985, 488 A.2d 726.

Although a child born in New Jersey had visited her father in New Jersey after moving away from the state with her custodial mother, the child had no substantial connection with New Jersey; New Jersey lacked jurisdiction over custody. LF v. GWF, 1982, 443 A2d 751, 183 NJ Super. 195. But cf. Dykes v. Dykes, Fla. App. 5 Dist. 1981, 395 So.2d 188.

On a petition for modification, evidence was insufficient to establish "significant connections" if the children were only in the state for visitation. Mattleman v. Bandler, 1983, 461 A2d 561, 123 NH 368. But cf. Hofer v. Agner, Fla.App.Dist. 1979, 373 So.2d 48.

The state in which the mother resided and which had made the original custody decree lost its preexisting juris-

diction where the children's only remaining connection was visitation with their non-custodial mother. Olson v. Olson, 1985, 494 A2d 737, 64 Md. App. 154. But cf. Joseph EH v. Jane EH, 1980, 423 A.2d 739, 283 Pa. Super. 109.

New York lacked jurisdiction to decree concerning custody where the children had not lived in New York for five years and their only connection was their father's visitation rights. Swire v. Swire, 1983, 494 A.2d 1035, 202 N.J. Super. 189. But cf. Reeve v. Reeve, Fla. App. 1 Dist.1980, 391 So.2d 789.

The Court of Appeals of Virginia did not explain what the basis of the significant connections might have been. A concept as crucial as substantial evidence about a child's welfare should be defined plainly. If definition of such a crucial term is left only to trial court discretion, the UCCJA's and PKPA's goal

of limiting, rather than proliferating, jurisdiction (Hart v. Hart, 1985, 695 P.2d 1285, 236 Kan. 856) is not served.

Of course, this Court requires an explanation of why definition of "significant connections/substantial evidence" and/or clarification of the "continuing jurisdiction" provisions of the PKPA are important federal issues. The answer is that regulation of interstate jurisdictional activity is obviously a federal issue; otherwise there would be no Uniform Act and no PKPA. Yet now, the essential reasoning behind the Uniform Commissioners' work and the Wallop Amendment can be evaded by the "Jurisdiction Forever Rule" coupled with a fast and loose interpretation of "significant connections" and "substantial evidence"--such as that adopted by the trial court in Etlin v. Etlin and allowed to proceed uncorrected through the highest Court of

the Commonwealth of Virginia.

D. The Federal Issue Presented

Since the decision in Thompson, supra, the Supreme Court of the United States has told the fifty states what the PKPA does not do. Petitioner asks this Court to continue the process, grant certiorari, and tell the several states what the PKPA does do.

THE STATES ARE DIVIDED AND CONFUSED

Can a Forum State ever modify the decree of its sister state if a non-custodial parent remains behind and invokes the continuing jurisdiction of the decree state? In the face of conflicting definitions and widely divergent interpretations, the several states have come down on both sides of the question.

SAYING ONLY THE DECREE STATE RULES: Clarke v. Clarke, 1985, 496 A.2d 361, 126 N.H. 753; Mark L. v. Jennifer S., 506 NYS2d 1020, 133 Misc.2d 454 (N.Y. 1986);

Enslein v. Enslein, N.Y.A.D. 2d Dept. 1985, 492 NYS2d 785; Walsh v. Walsh, 458 NYS2d 835, 117 Misc.2d 815 (1983); S. Frederick P. v. Barbara P., 454 NYS2d 202, 115 Misc.2d 332 (1982); Schoeberlein v. Rohlfing, Minn App 1986, 383 NW2d 386; State ex rel Valles v. Brown, 639 P2d 1181, 97 NM 327 (1981); Ingram v. Ingram, 463 So.2d 932 (La. App. 2d Cir. 1985); Wheeler v. Buck, 452 So.2d 864 (Ala. Civ. App. 1984); O'Daniel v. Walker, 686 SW2d 805, 14 Ark. App. 210 (1985); McDougald v. Jenson, C.A. 11 (Fla) 1986, 786 F.2d 1465, cert den 107 S.Ct. 207; Heartfield v. Heartfield, C.A.Tex 1985, 749 F.2d 1138; Kumar v. Santa Clara County Superior Court, Cal. App. 1981, 177 Cal. Reptr. 763; Bahr v. Bahr, 442 NYS2d 687, 108 Misc.2d 920, aff'd 458 NYS2d 247, 91 AD2d 1010 (1981); Tufares v. Wright, 644 P2d 522, 98 NM 8 (1982); In re McBride, Ala. Civ.

App. 1985, 469 So.2d 645; Applegate v. Gant, 460 So.2d 1293 (Ala. Civ. App. 1984); Flannery v. Stephenson, 416 So.2d 1034 (Ala. Civ. App. 1982); Evans v. Evans, 668 F.Supp. 639 (M.D. Tenn 1987); Garrett v. Garrett, 732 SW2d 127 (Ark. 1987); Yacco v. Durley, 457 NYS2d 384, 117 Misc.2d 69 (1982); Department of Human Services v. Avinger, 721 P.2d 781 (NM App 1985); Belosky v. Belosky, 640 P.2d 471, 97 NM 365 (1982); Marks v. Marks, 315 SE2d 158 (S.C. App. 1984); In re Fox, App 2 Dist. 1986, 225 Cal. Reptr. 823, 180 C.A. 3d 862, rev den; Jefferson v. Downs, 436 NYS2d 169, 107 Misc.2d 852 (1981) to name a few.

SAYING THE FORUM STATE MAY RULE: Voninski v. Voninski, 661 SW2d 872 (Tenn App. 1982); Debra S. v. Roger S., NYS 2d 723, 116 Misc.2d 264 (1982); Mebert v. Mebert, 444 NYS2d 834, 111 Misc.2d 500 (1981); Leslie F. v.Constance F., 441

NYS2d 911, 110 Misc.2d 86 (1981); Virginia E. E. v. Albert S.P., 440 NYS2d 979, 110 Misc.2d 448 (1981); In re Marriage of Leyda, 398 NY2d 815 (Iowa, 1987); Snow v. Snow, Minn App. 1985, 369 NW2d 581; Dennis v. Dennis, 366 NW2d 474 (ND 1985); Quenzer v. Quenzer, 653 P2d 295, cert den 103 S.Ct. 1436, 460 US 1041, 75 L.Ed.2d 794; Ziegler v. Ziegler, 691 P.2d 773, 107 Idaho App. 527 (1984); Arbogast v. Arbogast, 327 SE2d 675 (W.V. 1984) (holding that a custody decree not made in compliance with the PKPA could not vest continuing jurisdiction in the decree state); Nielsen v. Nielsen, 472 So.2d 133 (La. App. 5 Cir. 1985); Wachter v. Wachter, 439 So.2d 1260 (La. App. 5 Cir. 1983) (holding that the Decree State could not make an order consistent with the provisions of the PKPA while it was not the child's home state); Boyd v. Boyd, 653 SW2d 732 (Tenn App 1983); In re

Custody of Thorensen, 730 P2d 1380, 46 Wash. App. 493 (1987); In re Custody of Dunn, 701 P2d 158 (Colo. App. 1985) (holding it was abuse of discretion for the court in the forum state to automatically reject jurisdiction in favor of the decree state!); In re Reynolds, 441 NE2d 1141, 2 Ohio App 3d 309, 2 OBR 341 (1982); Alexander v. Ferguson, 648 F. Supp. 282 (D. Md. 1986); Serna v. Salazar, 651 P.2d 1291, 98 NM 648 (1982); Walker v. Frericks, 328 SE2d 126, 285 S. Car. 139 (App. 1985); Berry v. Berry, 466 So.2d 138 (Ala. Civ. App. 1985); Pierce v. Pierce, 640 P.2d 899, 197 Mont. 16 (1982); Middleton v. Middleton, 314 SE2d 362, 227 Va. 82 (1984); Clark v. Kendrick, 670 P2d 32 (Colo. App. 1983); Herrero v. Matas, 447 So.2d 335, rev dismissed 453 So.2d 44 (Fla App 3 Dist 1984); Matter of T.C.M., 651 SW2d 525 (Mo App 1983); Fielder v. Thorn, 525 A.2d 576

(De. Fam Ct. 1987); Slidell v. Valentine, 298 NW2d 599 (Iowa, 1980) (holding that there must be "reasonable time limits" to the continuing jurisdiction of the decree state); Sinclair v. Albrecht, 336 SE2d 485, 287 S.C. 20 (App. 1985); Kioukis v. Kioukis, 440 A2d 894, 185 Conn. 249 (1981) (holding that when the connections with the decree state become slight, the forum state should take over); Bergh v. Bergh, 387 NW2d 213 (Minn App 1986); Wagner v. Wagner, 482 So.2d 780, writ den 487 So.2d 441 (La. App. 4 Cir. 1986); Olivia H. v. John H., 497 NYS2d 838, 130 Misc.2d 756 (1986); to name a few.

Even in the face of the voluminous and detailed statutory and caselaw, perhaps because of the voluminous and detailed statutory and caselaw, the several states are still unsure how to proceed; each case is a roll of the dice.

In this petition, the partial list of reported cases shows that radically different opinions--each of them learned and conscientious--have issued from Connecticut, New York, Minnesota, New Mexico, Louisiana, Alabama, California, Texas, Tennessee, Arkansas, South Carolina, Delaware, Iowa, Wyoming, Idaho, West Virginia, Washington, Colorado, Ohio, Maryland, Montana, Florida, Missouri and Virginia. The courts of each state have labored judiciously to come to the right decision about a uniform code and a federal law, both meant to protect interestate families and to promote federal judicial peace. It seems time for the United States Supreme Court to speak.

II. THE VIRGINIA COURT HAS ABUSED ITS CONTEMPT POWER IN ORDER TO DEPRIVE THE MOTHER OF CONSTITUTIONAL RIGHTS.

A. The Mother was Denied Procedural Due Process

Judge Bach issued a rule for civil

contempt on September 21, 1982, ordering Mother to show cause on October 1, 1982; it was never served upon her, yet she was held in contempt on October 26, 1982. [Appendix 30-31] In May, 1985, two and one-half years later, in an obvious contrivance, the Judge issued a bench warrant for her arrest for criminal contempt, alleging the contemptuous act of "misleading him" in 1982. [Appendix 32-33] The Sheriff arrested Michelle on that warrant on February 18, 1987. On February 20, 1987, upon being informed that the warrant had been drawn after the statute of limitations ran, Judge Bach offered to draw new process, using new grounds to satisfy legal requirements for Michelle's arrest [Appendix 34]. He revoked her bond and jailed her. [Appendix 34] Three weeks later he tried her for criminal contempt without a jury and sentenced her to 12 months in jail.

None of the protections afforded to citizens before they may be deprived of their liberty were afforded to Michelle.

B. The Virginia Court Did--or Did Not?-- Have Jurisdiction Over Civil Contempt

When matters of contempt and custody are inextricably interwoven, jurisdiction to hold a person in contempt depends on subject matter jurisdiction pursuant to the UCCJA. Funk v. Macauley, Ind. App. 2 Dist. 1983, 457 N.E.2d 223. O'Daniel v. Walker, 1985, 686 S.W.2d 805, 14 Ark. App. 210. The states' conclusions on this matter are divided just as sharply, if not as often, as their conclusions about custody jurisdiction. The Macauley court, for example, held that 10 years after the children had left the state with their custodial parent, that state retained jurisdiction. Kirylik v. Kirylik, 357 S.E.2d 449 (S.C. 1987) separated jurisdiction to hear a custody modi-

fication petition from jurisdiction to hold a parent in civil contempt, saying:

> "Even if a court loses jurisdiction to modify its prior orders under the UCCJA, it retains the inherent power to enforce compliance ... through civil contempt." Id. at 450.

It went on to affirm the trial court's decision not to exercise jurisdiction, pointing out that the Forum State could enforce the Decree, by contempt or otherwise.

Another case, Siegel v. Siegel, 417 N.E.2d 1312, 84 Ill.2d 212, 49 Ill. Dec. 198 (1981) invalidated a decree holding an out-of-state custodial parent in contempt because the statutory prerequisites for subject matter jurisdiction over the subject matter of custody could not be met, although Illinois had made the initial decree and had even provided in it that it had exclusive continuing jurisdiction. The decree enjoined both parents from seeking modification in

other forums. Id. at 1313. The Court's held that it was the general rule in Illinois that the Decree State maintained continuing jurisdiction of the subject matter and the parties for modification purposes, but went on to analyze the UCCJA provisions for modification jurisdiction, concluding that the Act

> "does not excuse the original court from continuing to meet the jurisdictional standards of section 3 [analogous to VA Code 20-126]."

This case relied heavily on Professor B. Bodenheimer, reporter for the special committee of the Commissioners on Uniform State Laws which prepared the UCCJA, citing B. Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand.L.Rev. 1207, 1237 (1969). Bodenheimer's position was that the Decree State would have jurisdiction to modify "unless that court no longer has jurisdiction under the 'home

state' or 'strong contacts' test." 22 Vand.L.Rev. 1207, 1236. The Siegel court concluded that, since the custody and contempt proceedings were inextricably interwoven,

> "...even though the mother was in violation of the circuit court's order, it was an abuse of that court's discretion to adjudge her in contempt ..."

at which point it found the court below to be without jurisdiction and vacated.

C. The Mother was Denied Substantive Due Process

Since there is a difference in standards of proof and Constitutional protection for defendants in criminal as opposed to civil proceedings, whether contempt is civil or criminal is very important. Virginia itself recognizes that contempt is considered a serious crime to be tried by a jury when the sentence exceeds six months. Green v. Tucker, 375 F.Supp. 892 (E.D. Va. 1974). The essential difference is that civil

contempt lies for disobedience to an order setting forth the rights of a litigant (such as denial of visitation), whereas criminal contempt is generally a direct act against the Court or at least an act which obstructs justice. A Judge has the power to punish summarily for direct, criminal contempt which might threaten the administration of justice. From the record in this case, it is clear that Michelle was held in criminal contempt not because the elements of criminal contempt were present, but because the court wished to jail her.

The Virginia court manipulated the contempt powers as it had manipulated the jurisdictional statutes. The judge held Mother in contempt by embedding her trial in a civil custody proceeding. Then he sentenced her for criminal contempt, and appeal was denied her because the contempt, said to be criminal, could not

be reviewed on appeal (like a civil matter) but only on writ of error.

D. The Mother was Denied Equal Protection of Law

Perhaps the abuse of the contempt powers shows, more clearly than anything else, why jurisdiction in custody matters must not be determined by "feelings" and "impressions" but only by adherence to law. If a state court does not lawfully exercise jurisdiction over the subject matter of a custody trial, it must discard someone's constitutional rights in order to enforce its own orders. That is what happened in the Etlin case.

Michelle would have had to be tried in Maryland for having denied visitation, or having "absconded with the child," if that were to be considered criminal contempt. (Article III, Section [3], U.S. Constitution). She could be tried in Virginia for civil contempt of a valid Virginia decree, but a jail term could

only be imposed in a coercive, not punitive, manner. (Since Daniel's father already had him, Michelle could not be coerced to provide him.) No matter how the contempt sentence is viewed, it comes out unConstitutional. And in many other state courts in the country, civil and criminal contempt are being mixed, redefined, confused, misused and abused in order to provide judges with legislative, judicial and executive powers--in effect, to provide judges with kingly powers.

This was briefed to the Court of Appeals of Virginia [Appendix 15], which rejected consideration of the appeal on a technicality that protected no valid state interest: that contempt had to be reviewed by writ of error. The Virginia statute cited, 19.2-318, authorizes writ of error in criminal contempt cases; it is not exclusive and does not contain any

language which precludes review by appeal. When trial of contempt and custody are held together, it would seem obvious that the appeal of both should be taken together, to promote judicial economy if not for other reasons.

It is undeniable, by the mere fact that the contempt and custody trials were held together, that they were inextricably interwoven. Michelle's conviction and sentence were contained in the same order as the custody decision. [Appendix 10-11] Systematically, then, the contempt was viewed as civil and/or criminal in Michelle's worst interest. When Michelle would have Constitutional rights, the contempt was viewed in a civil context; when Michelle would have the right of appeal, it was viewed in the criminal context. When Michelle would have escaped a jail term, it was viewed in a criminal context; when facts had to

be proven beyond a reasonable doubt and a jury had to be empaneled, it was viewed as civil.

This contamination even persisted in the Appellate Court. Michelle's petition for review to the Supreme Court of Virginia pointed out that the technicality was applied in a discriminatory manner, since at least one defendant recently had his criminal contempt conviction reviewed by appeal in the very Court where her own appeal was dishonored. [Appendix 38] However, her petition was denied.

The use of the contempt powers of a court can effectively elevate judge-made "law" over legislature-made law, threatening the separation of powers inherent in the Constitution. The trial court below made a law in 1982 imposing affirmative obligations upon Michelle, a citizen of Maryland. (This order was not even signed.) The same trial court then

interpreted and enforced its own unwritten order, and punished disobedience to it, without subject matter or personal jurisdiction, over a citizen of another state.

The powers of civil and criminal contempt are unduly vague and particularly in the Commonwealth of Virginia, they merge and are ill defined. See Leisge v. Leisge, 224 Va. 303, 296 S.E.2d 538 (1982). As a result, proceedings can end up following no law at all, as they fall through the cracks between civil and criminal procedure. This violates a defendant's right to substantive due process. (Fourteenth Amendment to the U.S. Constitution, Section 1).

Had Michelle broken a real Virginia law in Maryland, she would not have been subject to such a deprivation of rights. Had she broken a Maryland law in Maryland, or a Virginia law in Virginia, she

would be entitled trial with court appointed counsel, bail, the presumption of innocence, the right to appeal and a jury. But most important, she would have had the protection of the Eighth Amendment against being deprived of her first-born son as punishment for a misdemeanor.

CONCLUSION

The Uniform Commissioners, drafters of the PKPA, the commentators, and the highest courts of the several States have toiled for 20 years with more than 10 pages of law (small print, single spaced) describing the jurisdictional rights and responsibilities involved in interstate custody disputes. In light of these complex criteria, the idea that jurisdiction in 1981 automatically confers jurisdiction in 1987 is ludicrous. Their careful work could have been cut drastically if they had considered only jurisdiction for original decrees, and then tacked on the Jurisdiction Forever Rule.

A logical view of the Jurisdiction Forever Rule also supports the statutory view. To say that a court may rule in 1987 because it ruled in 1981 is no more logical than to say that a mother should have custody in 1987 because she had cus-

tody in 1981. In fact, the latter is much more likely to be reasonable in the child's best interest. Recognition that custody depends upon circumstances which can change requires corresponding recognition that jurisdiction to decree as to custody does the same. To imagine that a child has moved with his custodial parent to a sister state, and his life has changed to such a degree that his custodial situation should be changed, while assuming the immovable ability of the decree state to make a determination merely because it has decreed in the past, is senseless. How can the ability of the custodial parent to function in the best interests of the child be considered continuously changeable, while the ability of the Decree State court to function in the best interests of the child remains a constant?

A more important consideration is

that the equal protection of laws guarantees for residents of a sister state access to its courts of competent jurisdiction. Absent some overriding reason why the court in the sister state (if it has become the home state of the child and the state with the most significant evidence) should not provide access to its citizens, that court cannot be deprived of jurisdiction. For Virginia to be able to deny Michelle and Daniel the equal protection of Oregon's laws is ipso facto unConstitutional. It is also absurd. In fact, Mr. Justice Marshall, writing for the Court in Thomson, supra, commented on a similar eventuality that would arise if federal courts were to hear interstate cases under the PKPA:

> "Petitioner's proposal is all the more remarkable in the present case, in which he seeks to have a California District Court enjoin enforcement of a Louisiana state-court judgment before the intermediate and supreme courts of Louisiana even have had an opportunity to review

that judgment." Id. at 520, n. 5. While Oregon proceeded in compliance with both the UCCJA and the PKPA, Virginia suddenly usurped its jurisdiction (as soon as Father physically removed Daniel from Oregon) at a time when it could not comply with either the Uniform Act or the Federal Act to decree concerning custody of Daniel. The Virginia court had no right to rule in 1987 because it had no statutory basis to do so.

The court also exceeded its jurisdiction in convicting Mother of criminal contempt. Such conviction would require a lawful proceeding which automatically activated constitutional protection for the mother. The order of which Mother was charged with contempt would have had to be registered in Maryland (which could not be done because it was not signed and it did not comply with the PKPA), and Maryland would have the responsibility

under the PKPA to enforce it. Michelle's contempt trial would have taken place in Maryland with a jury, if she chose.

No person may be deprived of life, liberty or property without due process, even by a judge. The powers of a judge, like other legal powers vesting in the state, may not encroach upon individual liberty absent the operation of law.1/ Yet the case before the Court reveals that a judge in Virginia not only encroached upon the Mother's liberty interest in the equal protection of laws, including the Uniform Law and the Federal Act passed to shore it up; he also removed the mother's Constitutional rights in trying her for a crime by abuse of the civil contempt process of the court.

1/ There is a difference between "operation of law" and "done by a Judge." The difference is statutory basis for what the Judge does. Lacking statutory authority, a Judge's deeds are not valid.

This Court should grant certiorari because the Supreme Court of Virginia has upheld a state court abuse of process which has denied the Mother her Constitutional rights, while ignoring a federal act and a uniform law instituted to prevent such abuses.

Respectfully submitted,

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